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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 JUAN SALINAS BAUTISTA, a/k/a Jose
13 Morales-Victoria,
14 CEDRIC BARQUET,
JERMAINE E. SATTERWHITE,
JODIE TAYLOR,

15 Defendants.

NO. CR08-82RSL

ORDER DENYING DEFENDANT'S
MOTIONS TO SUPPRESS

16 **I. INTRODUCTION**

17 This matter comes before the Court on “Defendant Barquet’s Motion to Suppress Search
18 of Wire Communications and Request for Franks Hearing,” Dkt. #466, “Defendant Barquet’s
19 Second Motion to Suppress Search of Wire Communications and Request for Franks Hearing,”
20 Dkt. #468,¹ and “Defendant Barquet’s Motion to Suppress Search of Vehicle and Request for
21 Franks Hearing,” Dkt. #467. Defendant contends that, in seeking the wiretap orders, the
22 government failed to provide “a full and complete statement as to whether or not other
23 investigative procedures have been tried and failed or why they reasonably appear to be unlikely
24 to succeed if tried or to be too dangerous,” 18 U.S.C. § 2518(1)(c). Defendant further contends

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26 ¹ Defendant Salinas Bautista joins in defendant Barquet’s two motions to suppress the search of
27 wire communications. Dkt. #469.

1 that affidavits in support of the wiretap orders and search warrant include materially false
2 information that was knowingly and intentionally included, or that was included with reckless
3 disregard for the truth, and that they omit material information. The Court heard oral argument
4 on April 28, 2009. For the reasons set forth below, the Court denies defendant's motions.

5 **II. DISCUSSION**

6 **A. Background**

7 This case arises out of a long-term investigation into a large-scale drug trafficking
8 organization run by Shawn Piper and his wife Nicola Kilcup. The investigation has yielded
9 indictments against fifteen defendants in all.

10 As part of the investigation into the conspiracy, the government applied for and received
11 an order authorizing the interception of Piper's cell phone on January 22, 2008. On February
12 22, 2008, the government sought and received authorization to continue intercepting Piper's cell
13 phone calls for another thirty days and to begin intercepting Kilcup's cell phone calls.

14 The investigation concluded on or about March 20, 2008, with the execution of
15 coordinated search warrants and arrest warrants. One of the search warrants was for defendant
16 Barquet's suspected residence at 8816 9th Avenue SW, Apt. #7, in Seattle, Washington. Based
17 on that search, federal agents determined there was probable cause to seize a Volvo vehicle that
18 was parked outside defendant Barquet's apartment. The officers secured the vehicle and
19 transported it to a federal facility pending an application for a search warrant, which was issued
20 the following day. Agents eventually found a small baggie of crack cocaine in the vehicle along
21 with documents bearing defendant Barquet's name.

22 **B. Analysis**

23 **1. Necessity**

24 An authorization for a court-authorized wiretap must include "a full and complete
25 statement as to whether or not other investigative procedures have been tried and failed or why
26 they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. §

2518(1)(c). It must also recite facts indicating that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.” Id. § 2518(3)(c). “This necessity requirement means that the affidavit must set out a factual background that shows that ordinary investigative procedures, employed in good faith, would likely be ineffective in the particular case.” United States v. Brone, 792 F.2d 1504, 1506 (9th Cir. 1986). The Ninth Circuit has held that while “the wiretap should not ordinarily be the initial step in the investigation, . . . law enforcement officials need not exhaust every conceivable alternative before obtaining a wiretap.” United States v. McGuire, 307 F.3d 1192, 1196-97 (9th Cir. 2002).

The Court finds that the issuing judge did not abuse his discretion, see id. at 1197, in finding that the affidavit in support of the initial wiretap met the statutory requirement of necessity. Agent David Korn of the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) in Seattle submitted a 49-page affidavit detailing the use and limitations of normal investigative techniques. For instance the affidavit explained that the pen registers and trap and trace information they obtained “do not identify the parties to the conversations, cannot identify the nature or the substance of the conversations, and cannot differentiate between legitimate calls and calls for criminal purposes.” Affidavit of David W. Korn (“Korn Affidavit”), Dkt. #478, Ex. A ¶ 117. See United States v. Commiato, 918 F.2d 95, 97 (9th Cir. 1990). While the government did rely on confidential informants in its investigation, the affidavit explained that the primary informant was kept away by Piper from the other members of the conspiracy. Korn Affidavit ¶ 120. Nor was he able to “fully identify the manner in which this organization launders its narcotic proceeds.” Id. Additionally, the use of physical and electronic surveillance yielded limited results, given the counter-surveillance measures employed by members of the organization, id. ¶ 126, the restricted field of view of the pole camera, id. ¶¶ 125, 133, and the fact that most of the drug transactions took place behind closed doors, id. ¶ 127.

The affidavit also addressed why other investigative techniques were not reasonably

1 likely to succeed in this case. It explained that undercover officers were not employed because
2 it was highly unlikely that they would be able to penetrate the “tightly-knit group of
3 co-conspirators” that comprised Piper’s “trusted circle.” Id. ¶ 135. In addition, officers chose
4 not to interview individual members of the organization so that they would not alert other
5 members to the investigation. Id. ¶ 138.

6 Defendant contends that there are numerous methods of investigation which could have
7 been pursued prior to requesting a wiretap. However, as noted above, the government need not
8 pursue every possible technique before legitimately obtaining a wiretap order. See McGuire,
9 307 F.3d at 1197. Nor do defendant’s speculations about other possible techniques suggest that
10 the government has failed to make a showing of necessity. As the government explains in its
11 brief, Dkt. #478 at 15, officers did not conduct additional surveillance on Piper’s apartment
12 because Piper moved out of the residence identified by the informant. Moreover, although the
13 officers conducted six traffic stops, the traffic stops were only “fruitful in identifying individuals
14 but were ineffective in determining whether they were involved in the drug conspiracy and, if
15 so, what their role is in the conspiracy,” Korn Affidavit ¶ 128. Defendant also speculates that
16 the confidential informant had access to other members of the organization, Dkt. #466 at 9, but
17 the affidavit provides sufficient information explaining why the use of informants was not
18 successful in ascertaining the full scope of the conspiracy, Korn Affidavit ¶¶ 120-124.²

19 Defendant further contends that the affidavit provides nothing more than boilerplate
20 statements rather than facts specific to this case. Dkt. #466 at 10 (citing United States v.
21 Blackmon, 273 F.3d 1204, 1210 (9th Cir. 2001)). But the Court finds that the affidavit contains
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25 ² At oral argument, the government further explained why it would have been both infeasible and
26 unwise to either have the informant request access to lower level members of the organization when he
27 already had a direct link to Piper or supply the informant with the names of suspected co-conspirators.

1 sufficient specificity.³ Contrary to defendant's position, see Dkt. #466 at 5, the fact that the
2 affidavit recites verbatim the statutory language does not suggest that the facts used to support a
3 necessity determination are boilerplate; the Court can hardly fault Agent Korn for knowing the
4 applicable standard and clearly delineating it before attempting to prove he has met that
5 standard. Even if the Court were to agree with defendant that some statements expressed
6 general conclusions, "[i]n light of the many assertions that are supported by specific probative
7 facts, the few conclusory statements . . . do not render the affidavit - read in its entirety in a
8 practical and commonsense fashion - invalid under § 2518(1)(c)," Commuto, 918 F.2d at 98.

9 Finally, defendant argues that the government failed to use customary investigative
10 techniques to obtain evidence against any participants other than Piper and Kilcup. Dkt. #484 at
11 2. While the phone records search and surveillance efforts centered on the leaders of the
12 organization, they were utilized in order to determine the identity and role of the other members.
13 The agents reasonably focused on the center of this network of criminal activity in order to build
14 its case against the upstream and downstream participants. Defendant has not provided any
15 caselaw suggesting that law enforcement is required to exhaust all investigative techniques with
16 respect to each individual member of a conspiracy before it seeks a wiretap order. On the
17 contrary, the Ninth Circuit has held that "the government is entitled to more leeway in its
18 investigative methods when it pursues a conspiracy." McGuire, 307 F.3d at 1198; see id. ("[W]e
19 have 'consistently upheld findings of necessity where traditional investigative techniques lead
20 only to apprehension and prosecution of the main conspirators, but not to apprehension and
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22 ³ See Korn Affidavit ¶ 118 (telephone records were particularly unhelpful given that "some of the
23 members of the Piper organization are either family members . . . or longtime associates"); id. ¶ 126
24 (explaining counter-surveillance methods); id. ¶ 131 (G.P.S. devices were likely to be detected because
25 "Piper owns and deals out of an auto detail shop, where cars are washed and detailed on a daily basis");
26 id. ¶ 137 (the fact that "a number of Piper's associates have criminal histories for crimes of violence,
27 including murder and manslaughter, . . . increases the likelihood that witnesses will not cooperate with
28 investigators"); id. ¶¶ 142-143 (trash search was not utilized because "the trash can was located directly
outside Shawn Piper's rear sliding glass door" at his previous apartment and "officers have not been able
to identify any common or individual trash containers" at Piper's new town home complex).

1 prosecution of . . . other satellite conspirators.’’) (quoting United States v. Torres, 908 F.2d
2 1417, 1422 (9th Cir. 1990). The government need not engage in an inefficient, piecemeal
3 approach when attempting to determine the full scope of a large-scale organization.

4 Defendant’s second motion to suppress the search of wire communications, Dkt. #468,
5 reiterates the contentions listed above, see id. at 5-6, and fails for the same reasons. Contrary to
6 defendant’s unsupported statement that the second affidavit “makes it clear that the government
7 did not need any further information which could be obtained by way of wiretap,” id. at 3, the
8 affidavit fully explained that, as a result of the first wiretap, officers had identified Kilcup as a
9 new target of the investigation, Second Affidavit of David W. Korn, Dkt. #478, Ex. B ¶ 114.
10 Moreover, the affidavit stated that the officers still needed to identify several of Piper’s co-
11 conspirators, id. ¶ 115, as well as at least one cocaine supplier, id. ¶ 116. The Court finds that
12 the second affidavit more than adequately detailed why the continued and extended use of
13 wiretaps was necessary and why traditional investigative techniques would not suffice.⁴

14 **2. Franks hearing**

15 Defendant requests that the Court conduct a hearing pursuant to Franks v. Delaware, 438
16 U.S. 154 (1978). Franks held that “where the defendant makes a substantial preliminary
17 showing that a false statement knowingly and intentionally, or with reckless disregard for the
18 truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is
19 necessary to the finding of probable cause, the Fourth amendment requires that a hearing be held
20 at the defendant’s request.” 438 U.S. at 155-56. Franks set forth a rule of limited scope; a
21 defendant is entitled to a Franks hearing “only if he makes a two-fold showing: intentional or
22 reckless inclusion or omission, and materiality.” United States v. Bennett, 219 F.3d 1117, 1124

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24 ⁴ Defendant’s second motion to suppress also alleges facial insufficiency, stating that the letter to
25 the office of the United States Attorney in Seattle did not authorize the wiretapping of Kilcup’s
26 telephone. Dkt. #468 at 3. However, upon the government explanation that the wiretap order
27 authorized the wiretapping of Kilcup’s cell phone but not her text messages, Dkt. #478 at 8, defendant
28 withdrew this claim at oral argument.

1 (9th Cir. 2000). A false inclusion or an omission is considered material if the affidavit, purged
2 of its defects, would not be sufficient to support a finding of probable cause or necessity. Id.

3 Defendant has failed to meet his burden in requesting a Franks hearing on his motions to
4 suppress the wiretap information. Defendant contends that the omission of various facts
5 regarding traffic stops and the inclusion of the targets' criminal histories is "misleading." See
6 Dkt. #466 at 7. But this does not amount to a substantial showing of actual and deliberate
7 falsity. See United States v. Prime, 431 F.3d 1147, 1150 n.1 (9th Cir. 2005). In his reply brief,
8 defendant essentially concedes that he does not have enough information to support his
9 allegations. See Dkt. #484 at 3 ("Of course, we had to speculate about that because we didn't
10 have the information."); id. at 4 ("The defendants can only contend that this was done recklessly
11 because we don't know whether it was done in order to wilfully hide this information from the
12 Court."). "To mandate an evidentiary hearing, the challenger's attack must be more than
13 conclusory and must be supported by more than a mere desire to cross-examine." Franks, 438
14 U.S. at 171. Because there is a presumption of validity with respect to the affidavit supporting
15 the search warrant, id., the affiant's statements are deemed trustworthy absent any information
16 indicating otherwise. Defendant's "disbelief" regarding officers' intentions "does not amount to
17 the substantial showing required under Franks." United States v. Meling, 47 F.3d 1546, 1554
18 (9th Cir. 1995). Defendant's suggestion that "[t]he government's memorandum makes it clear
19 why a Franks hearing is essential in order for the Court to review [] the motions," Dkt. #484 at
20 3, ignores that it is *defendant's* burden to furnish "[a]ffidavits or sworn or otherwise reliable
21 statements of witnesses" or explain their absence," Franks, 438 U.S. at 171; a hearing cannot be
22 triggered by the face of the pleadings alone. See United States v. Chavez-Miranda, 306 F.3d
23 973, 979 (9th Cir. 2002) ("Chavez-Miranda offers no evidence . . . to support the claim that the
24 omissions were reckless or intentionally misleading. This bare assertion falls short of the
25 preponderance of the evidence that Franks requires.").

1 Defendant's presentation at oral argument also failed to make the substantial showing
2 required by Franks. Although defendant argued that the affidavits could have included greater
3 detail regarding why other investigative techniques were ineffective, he was unable to identify
4 any statement in the affidavits that was untrue. To the extent the affidavits' relative lack of
5 detail (when compared to the subsequent police reports) constitutes an omission, defendant has
6 made no showing of materiality. The inclusion of more exhaustive explanations would have in
7 no way called into question the ultimate necessity determination.

8 Defendant also seeks a Franks hearing on his motion to suppress the search of his vehicle,
9 contending that the affidavit in support is "extremely misleading" and includes materially false
10 information and recklessly omits material information. Dkt. #467 at 3. The Court disagrees.
11 Defendant first argues that the affidavit's statement that "[a]ll of the controlled substances were
12 found in the kitchen of Location 2, together with documents bearing Barquet's name" is
13 materially false because the legal paperwork for defendant Barquet was actually found in the
14 living room. Id. at 4. But as the government explains, "the majority of the seized drugs
15 discovered in the apartment were found in the same drawer as an envelope addressed to
16 Barquet." Dkt. #479 at 6. Thus, the statement contains no materially false or misleading
17 information. Moreover, as noted above, the fact that the police report submitted after the search
18 warrant application included greater detail than the affidavit does not necessarily mean that the
19 affidavit omitted material information. Although the affidavit does not specifically mention that
20 drugs were also found in other places throughout the residence, including in a jacket belonging
21 to defendant's girlfriend M.B., the affidavit did make clear that M.B. was the lessee of the
22 apartment and that she was present with defendant at the time of the search. Dkt. #479, Ex. E ¶
23 13. Nor does M.B.'s potential culpability diminish the probable cause with respect to defendant.

24 Defendant also contends that paragraph 14 of the affidavit gives the false impression that
25 agents had previously observed defendant Barquet drive the Volvo to a drug deal. But the
26 paragraph says no such thing. After stating that Agent Korn had seen defendant Barquet driving
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1 the Volvo on at least one prior occasion, the affidavit then proceeded to detail the events of that
2 day:

3 On March 4, 2008, Barquet and Kilcup met for a cocaine deal. After
4 the deal, the surveillance team followed Barquet back to Location 2.
5 Later that evening, Detective Brian Taylor saw the Volvo parked on
the street in front of Location 2. A black male identified as Barquet
got out of the car and went into apartment 7.

6 Id. ¶ 14. The affidavit notes that the Volvo was observed “[l]ater that evening,” not during the
7 cocaine deal. Even if a cursory reading of this paragraph leaves a mistaken impression, it is not
8 material. If the affidavit had specifically stated that defendant was driving another car during
9 the cocaine deal, probable cause would still have existed to search the Volvo.

10 **3. Warrantless Seizure of Volvo**


11 Finally, defendant contends that the seizure of the Volvo was improper because defendant
12 had already been placed in custody and removed from the scene. Dkt. #467 at 5. However,
13 because there was probable cause to believe that the vehicle contained contraband,⁵ officers did
14 not violate the Fourth Amendment in seizing the vehicle pending authorization to search it the
15 following day. The mere fact that the officers could have obtained the warrant at an earlier time
16 does not render the search or seizure invalid.

17 **III. CONCLUSION**

18 For all of the foregoing reasons, “Defendant Barquet’s Motion to Suppress Search of
19 Wire Communications and Request for Franks Hearing” (Dkt. #466), “Defendant Barquet’s
20 Motion to Suppress Search of Vehicle and Request for Franks Hearing” (Dkt. #467), and
21 “Defendant Barquet’s Second Motion to Suppress Search of Wire Communications and Request
22 for Franks Hearing” (Dkt. #468) are DENIED.

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26 ⁵ See Colorado v. Bannister, 449 U.S. 1, 3 (1980); Maryland v. Dyson, 527 U.S. 465, 466 (1999)
27 (“[U]nder our established precedent, the ‘automobile exception’ has no separate exigency requirement.”)

1 DATED this 29th day of April, 2009.

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7 Robert S. Lasnik
8 United States District Judge
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